Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT LOUIS STEVENSON,

Petitioner,

v.

THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, THE DISTRICT OF COLUMBIA, ALBERT GONZALES, ALAN HILL, JOHNNY GAY, LEWIS HAGLER, AND DEMETRIUS COLE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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INTRODUCTION

The Brief in Opposition makes no serious attempt to reconcile the conflicting decisions of the various courts of appeals. Nor does it dispute the exceptional importance of the D.C. Circuit's holding. Instead, the government claims that the submachine gun was admissible because Mr. Stevenson supposedly put his motivation for escape at issue and thereby opened the door to the admission of the gun. Neither the district court nor the court of appeals accepted this baseless argument, and there is no reason for this Court to do so. The government cannot obscure the important circuit split by raising a meritless procedural argument that no other court has accepted.

I. THE D.C. CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON A QUESTION OF EXCEPTIONAL IMPORTANCE.

Notwithstanding the government's attempt to recast this case as one based on an "opening the door" rationale, the D.C. Circuit's actual holding conflicts with decisions of other circuits on an important question of federal law. Like the district court, the D.C. Circuit held that the gun was admissible as evidence of Mr. Stevenson's motive for fleeing from the police. *See* App. 6a (holding that the gun was admissible as to the question whether "Stevenson was intent on escaping at all costs"); JA 114 (district court order admitting the gun as "evidence of the plaintiff's desperation . . . to avoid arrest and his intention to use his vehicle as a weapon"). Unlike the D.C. Circuit, a number of other circuits have held that if the defendants were unaware of the plaintiff's motivation for resisting arrest at the time they used deadly force, evidence of that motivation is inadmissible hindsight evidence. *See* Pet. 6-9.

The government does not seriously dispute this point. Indeed, the government does not even cite, much less attempt to distinguish, the First Circuit cases on which Mr. Stevenson

relied. *See* Pet. 7-8 (citing *Wierstak v. Heffernan*, 789 F.2d 968, 972 (1st Cir. 1986); *Senra v. Cunningham*, 9 F.3d 168, 172 (1st Cir. 1993)). The government at least attempts to distinguish the Eighth Circuit authority cited by Mr. Stevenson, but only by reference to its procedural argument that Mr. Stevenson opened the door to the admission of the gun. *See* Opp. 11-12 (discussing *Cummings v. Malone*, 995 F.2d 817, 823 (8th Cir. 1993)). Significantly, the government does not (and can not) deny that the actual *holdings* of the D.C. and Eighth Circuits are in conflict. Finally, the government purports to distinguish the Seventh Circuit's decision in *Palmquist v. Selvik*, 111 F.3d 1332, 1339 (7th Cir. 1997), but it does so only by attempting to distinguish an *earlier* decision of that court, *Sherrod v. Berry*, 856 F.2d 802, 807 (7th Cir. 1988) (*en banc*). *See* Opp. 11. Of course, no amount of distinguishing of one case can detract from the square conflict with the other.

As explained in the petition, and not disputed by the government, this circuit split addresses a matter of exceptional importance. The D.C. Circuit's holding deprives excessive force victims of the right to a fair trial by subjecting the jury to extraneous but highly prejudicial information. *See* Pet. 10-11. Accordingly, this Court's guidance is needed not only to reconcile the circuit conflict, but also to allow excessive force victims like Mr. Stevenson to receive fair trials.

II. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR THE RESOLUTION OF THIS IMPORTANT CONFLICT.

This case provides an excellent vehicle for the resolution of this conflict because the error was anything but harmless. All of the neutral eyewitnesses testified in favor of Mr. Stevenson, yet the jury returned a verdict for the defense after it was shown Mr. Wallace's very large submachine gun and heard repeated testimony regarding that gun. *See* Pet. 3, 9, 11. Accordingly, the government does not even attempt to argue that the error was harmless, and the D.C. Circuit did not rely on any such

rationale.

Nonetheless, the government argues that "Petitioner's decision in the trial court to place in issue his motivation for flight makes this case an improper vehicle for the issue he presents." Opp. 8. This argument is fanciful. The government did not raise it in the district court, and the district court did not rely on any such theory. *See* JA 116. When the government raised this contention in the court of appeals, the D.C. Circuit simply ignored it. The D.C. Circuit obviously considered the government's procedural arguments, for it held that Mr. Stevenson had not properly preserved one of his other arguments. *See* App. 7a. But the court addressed *this* issue on the merits precisely because it is properly presented.

As Mr. Stevenson explained in the court of appeals, there are a host of reasons the government's "opening the door" rationale must be rejected. *See* Appellant's Reply Br. 14-19. The simplest reason is that this is not the way in which the evidence was actually admitted or used at trial. The "opening the door" doctrine (also known as the doctrine of curative admissibility) applies "only to the extent necessary to remove any unfair prejudice which might otherwise have ensued" from the admission of "inadmissible or irrelevant evidence." *United States v. Brown,* 921 F.2d 1304, 1307 (D.C. Cir. 1990) (internal quotation omitted); *accord United States v. Martinez*, 988 F.2d 685, 702 (7th Cir. 1993). But the government's counsel raised the gun affirmatively, not curatively, before Mr. Stevenson introduced any evidence at all. Indeed, during his opening statement, and in his very *first* mention of the officers' encounter with Mr. Stevenson, the government's counsel dropped this bomb: "Officer Hill will tell you that as he is coming toward the car in which Mr. Stevenson is seated with Mr. Wallace *and with a semiautomatic Mac 11 submachine gun* . . . ." JA 191 (emphasis added); *see also id.* at 192 (stating that after the police stopped shooting, "a crime scene search officer there yelled out gun, gun; and the technicians backed off, and what they had found was this semiautomatic Mac 11 under and

coming from the garments of Mr. Wallace"). As this argument reflects, evidence regarding the gun was not admitted on a curative admissibility theory, and its use was not limited to such a theory. Accordingly, the admission of this evidence in this case cannot be justified on that basis. *See, e.g., United States v. Shue*, 766 F.2d 1122, 1130 (7th Cir. 1985) (citing cases).

Even more fundamentally, the District is wrong to argue that Mr. Stevenson opened the door to such devastating evidence by testifying that he was scared during the incident. The testimony at issue is the following: "I immediately – I'm scared," and "I just got scared and – my initial reaction was to back the car up. I was trying to get away from them." JA 206, 209. Such general and unsurprising background statements in the context of a narrative description of the key events in dispute could not possibly open the door to specific prejudicial inquiries into the various reasons Mr. Stevenson had to fear the police. *See, e.g., Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 967 (7th Cir. 1996) (holding that testimony regarding "general information" did not open the door to "specific" prejudicial information); *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496 (8th Cir. 1993) (holding that generalized testimony did not open the door to admission of other specific prejudicial instances). To the contrary, the only point made by Mr. Stevenson was the obvious one that he was scared, and that point was neither disputed at trial nor inconsistent with Mr. Wallace's possession of a gun.

The government's reliance on *Cummings* and *Sherrod* serves only to underscore this point. In *Cummings*, the Eighth Circuit held that prior inconsistent statements were admissible because they "directly contradicted" the defendant's trial testimony. 995 F.2d at 825. In contrast, Mr. Stevenson's statement that he was "afraid" of the armed officers who surrounded his car is not in any way contradicted by Mr. Wallace's possession of a gun. Thus, the "opening the door" rationale is inapplicable.

Similarly, the government is wrong to argue that *Sherrod* holds "that a weapon would be admissible for precisely the

reason it was allowed in evidence here by the District Court . . . to challenge 'the credibility of a witness.'" Opp. 11. As explained above, this is *not* the reason the district court admitted the evidence. Moreover, *Sherrod* states only that "'impeachment by contradiction is a technique well recognized in the federal courts by which *specific errors* in [a] witness['s] testimony are brought to the attention of the trier of fact.'" Opp. 11 (citing *Sherrod,* 856 F.2d at 806) (emphasis added). In this case, Mr. Stevenson never denied that a gun was in the car, and thus never opened himself up to impeachment on that point.

CONCLUSION

The government's meritless procedural argument cannot disguise the square conflict on this important question of federal law. Accordingly, this Court should grant the petition for writ of *certiorari.*

Respectfully submitted,

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